Beretey v New York City Health & Hosps. Corp.
2007 NY Slip Op 30088(U)
February 26, 2007
Supreme Court, Queens County
Docket Number: 0003443
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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MAMMUD RASHID BERETEY a/k/a BERETE, an Infant, by his Mother and Natural Guardian, MARIAMA SHERIFF

Index Number: 3443/06

Motion

Plaintiffs,

Date: 02/06/07

- against -

Motion Cal. Number: 2

NEW YORK CITY HEALTH & HOSPITALS CORPORATION (ELMHURST HOSPITAL CENTER),

Motion Seq. No. 1

Defendants.

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The following papers numbered 1 to 19 read on this motion by plaintiff deeming the notice of claim timely filed nunc pro tunc or, alternatively, for leave to file a late notice of claim.

	Papers Numbered
Notice of Petition-Affirmation-Exhibits............	1 - 4
Affirmation in Opposition-Exhibits.................	14-16
Reply Affirmation-Exhibits.........................	17-19

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff deeming the notice of claim timely filed nunc pro tunc or, alternatively, for leave to file a late notice of claim is denied.

Infant plaintiff alleges that he sustained injuries as a result of malpractice allegedly committed by defendant in connection with his birth on November 2, 1996, including pre-natal care and post-natal care up to his discharge from the

hospital on November 9, 1996. Plaintiff contends that, as a result of defendant's malpractice, he sustained perinatal asphyxia which, in subsequent years, manifested as cognitive developmental delays, hyperactivity, coordination difficulties, seizures and mental retardation. A notice of claim was served upon defendant on January 10, 2006, more than nine years after plaintiff's birth. A summons and complaint was filed on February 14, 2006.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law § 50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). The notice of claim herein was served upon defendant almost nine years past the ninety-day deadline for filing a notice of claim.

The Court has the discretionary authority to allow the filing of a late notice of claim within the period of limitation for commencing tort actions against a municipality (see General Municipal Law § 50-e[5]; Pierson v. City of New York, 56 NY 2d 950 [1982]). An action against a municipality or municipal corporation or entity must be commenced within one year and 90 days after the date plaintiff's cause of action accrued, which is the date the event occurred upon which plaintiff's claim is based (see General Municipal Law § 50-i). Where plaintiff is an infant, the statute of limitations on a medical malpractice action is tolled for a period not exceeding 10 years from the date the cause of action accrued(see CPLR 208). Therefore, the instant application, having been brought less than ten years after the alleged malpractice, is timely (see Henry v. City of New York, 94 NY 2d 275 [1999]).

In the exercise of its discretionary power to allow a late notice of claim, the Court is directed by General Municipal Law § 50-e(5) to consider, in particular, whether the municipality or municipal entity acquired actual knowledge of the facts underlying the claim within the initial 90-day period or within a reasonable time thereafter. The Court must also consider "all other relevant facts and circumstances", including infancy and whether the delay would cause substantial prejudice to the municipality or public entity.

Plaintiff contends that defendant had actual knowledge of the facts underlying his claim by virtue of being in possession of plaintiff's hospital records. Moreover, since it had actual knowledge through those records, defendant would not be prejudiced by a late notice of claim.

A hospital may be deemed, under appropriate circumstances, to have acquired actual knowledge of the facts underlying a claim of malpractice in the delivery of an infant by reason of having been in possession of the child's medical records since the time of the alleged malpractice (see Kurz v. New York City Health & Hospitals Corp., 174 AD 2d 671 [2nd Dept 1991]). However, " [m]erely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process" (Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]).

The hospital records clearly show that plaintiff's delivery was a difficult one, due to his large size - nine pounds, three ounces at birth, and due to cephalo-pelvic disproportion. A normal, spontaneous vaginal delivery had been expected, and Pitocin was administered to induce labor. When labor failed to progress after several hours, and the fetal heart monitor indicated repetitive mild variable decelerations, the decision was made to perform a Caesarean section, and plaintiff was delivered one hour later. Plaintiff was depressed at birth and was suffering from perinatal asphyxia. His initial APGAR score was one (1) after one (1) minute, but improved to five (5) after five (5) minutes and seven (7) after 10 minutes. He was discharged with a diagnosis of perinatal depression and clinical sepsis.

Although the hospital records clearly show that plaintiff had suffered respiratory distress, there is nothing in those records submitted on this motion that indicate that plaintiff suffered any of the injuries alleged so as to constitute notice to defendant of the facts upon which the claim is based. The records reveal no indication that plaintiff either at the time of his discharge or upon follow-up visits to Elmhurst Hospital showed signs of brain damage or other impairment.

Although the medical reports of plaintiff's physicians annexed to the motion opine that plaintiff's perinatal asphyxia was the result of waiting too long to perform an emergency C-section and that there is a causal connection between such departure from regular medical practices and procedures and plaintiff's subsequent condition, such after-the-fact analysis does not establish that defendant had actual knowledge within 90 days or reasonably thereafter of plaintiff's alleged injuries. There is nothing in the hospital records themselves that apprise defendant of the brain injuries that plaintiff alleges were the result of his negligent care. Moreover, neither the hospital records nor the affirmations of plaintiff's physicians indicate that perinatal asphyxia necessarily results in brain damage that

subsequently manifests itself in cognitive and developmental disorders or hyperactivity.

Although plaintiff's physician, Dr. Halbridge, who reviewed the hospital records, in his affirmation dated October 17, 2006 annexed to the moving papers, concludes in boilerplate form, "The consequential injuries from the perinatal asphyxia would have been fully appreciated by the staff at the time of the events in question," he does not state that perinatal asphyxia necessarily results in brain damage, nor does he set forth any objective basis for his conclusion that the hospital staff would have known that infant plaintiff would have suffered the delays alleged by reason of perinatal asphyxia in this particular case.

Likewise, the conclusion drawn by plaintiff's physician, Dr. Savino, in his affirmation dated October 18, 2006, annexed to the moving papers, that the hospital staff would have been on notice of the likelihood of permanent injury is entirely speculative.

These physicians did not diagnose infant plaintiff with any of the injuries alleged and did not examine infant plaintiff, but merely reviewed the child's medical records. The only records they reviewed relative to the injuries alleged are the pediatric follow- up records of Elmhurst Hospital(Exhibit 7 to motion), the unaffirmed report of plaintiff's examining developmental and behavioral pediatrician, Dr. Carotenuto, dated August 24, 2000 (Exhibit 8 to motion), the unsworn educational evaluation report of plaintiff's examining learning disabilities teacher, Frank Falcone, conducted on March 31, 2004 (Exhibit 9 to motion), the unaffirmed report of plaintiff's examining pediatrician, Dr. Zimmerman-Bier, dated October 4, 2004 (Exhibit 10 to motion) and an MRI report of plaintiff's radiologist, Dr. Lebovitz, dated March 8, 2006 (Exhibit 11 to motion) (Dr. Halbridge did not review this MRI report or make mention of it in his report).

The pediatric follow-up records annexed as Exhibit 7 relate to routine examinations and vaccinations of plaintiff in 1997 and 1998. They make no mention of brain injuries relative to hyperactivity, attention deficit, developmental delay, mental retardation or seizures.

The report of Dr. Carotenuto states that plaintiff shows delays in language and speech, socialization and visual motor coordination, and that he exhibits features of Attention Deficit Hyperactivity Disorder. Dr Carotenuto, however, does not link these delays with any brain damage resulting from perinatal asphyxia. He reviewed the pregnancy and birth history. He notes, "After discharge from the hospital he looked fine and was feeding well." He also concluded, "The nature of Rashid's delays is not clear. The peri-natal history was remarkable for some problems

around delivery, but they seemed to have resolved by a week of age."

The report of plaintiff's examining learning disabilities teacher, Frank Falcone, found plaintiff deficient or below average in academic and cognitive skills. No medical pathology was diagnosed, as this was merely an academic evaluation.

The report of Dr. Zimmerman-Bier found that plaintiff's "[o]ral motor tone was slightly decreased. Articulation was generally intelligible. Expressive and receptive language components were adequate for requests and some social interaction but limited for age." He also found that plaintiff's motor coordination was delayed. His impression was "suspected low cognitive skills, obesity and behavioral problems secondary to hyperactivity/impulsivity." He notes his awareness of plaintiff's post-natal complications including respiratory problems but reports no history of trauma. His examination only found delayed motor skills. He did not test for or diagnose Attention Deficit Hyperactivity Disorder (ADHD), academic/cognitive delays, mental retardation or any brain damage. He does not make any findings as to the cause of the low cognitive skills and hyperactivity that he noted from a review of plaintiff's medical history, but merely opines that "[d]iagnostic considerations include genetic abnormalities, neurofibromatosis and metabolic issues."

The brain MRI impression is, "Possibly a small cyst in the left choroid fissure/temporalhorn with mild mass effect on the hippocampus." It does not find a brain cyst, does not find a causal connection between any such possible cyst and plaintiff's developmental delays or any causal connection between the possible cyst and any injury resulting from perinatal asphyxia.

These reports find cognitive/educational and motor coordination delays. There is no positive diagnosis of ADHD, mental retardation or seizures. There is no finding of any brain injury. Therefore, the conclusions in the reports of Drs. Halbridge and Savino prepared for this litigation, which were expressed in virtually identical language, that plaintiff's injuries were caused by perinatal asphyxia are speculative, since there is no medical evidence of injury and since the reports of plaintiff's examining physicians, the review of which was the basis of the reports of Drs. Halbridge and Savino, did not find a causal connection between plaintiff's observed delays and his respiratory distress at birth.

Actual knowledge based upon hospital records may not be found absent a clear showing of a nexus between the alleged malpractice and the injuries (see In Re Fallon v. County of Westchester, 184 AD 2d 510 [2nd Dept 1992]). Although the

affidavits of plaintiff's physicians opine, nine years after the fact, that plaintiff's developmental, behavioral and cognitive disorders were the result of asphyxia caused by malpractice in his delivery, there is no showing that defendant derived actual knowledge of such facts within 90 days after plaintiff's birth or a reasonable time thereafter by virtue of their possession of the hospital records, since these records do not show that plaintiff sustained any developmental, behavioral or cognitive damage as a result of asphyxia. Indeed, plaintiff's own examining physicians, with knowledge that plaintiff was born in a state of respiratory depression and was diagnosed with perinatal asphyxia, did not ascribe a causal connection between such perinatal asphyxia and his delays. If it was not obvious to plaintiff's own examining physicians in 2000 and 2004 that plaintiff's perinatal asphyxia was a potential cause of his delays and possible ADHD, it would certainly be unreasonable to conclude that the hospital, at the time of his birth in 1996, had actual knowledge that his perinatal asphyxia would likely cause his subsequent alleged injuries.

Therefore, the record on this motion fails to establish that defendant had actual knowledge of the facts underlying the claim within 90 days after plaintiff's delivery or a reasonable time thereafter.

Although no single factor is determinative of whether the Court should allow a late notice of claim, one is singled out for special consideration: whether the municipal entity acquired actual knowledge within the 90-day time frame or a reasonable time thereafter. "The statute enumerates various factors relevant to an application for an extension, but it sets one apart from all the others: 'the court shall consider, in particular, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the [90-day period or within a reasonable time thereafter.' Other factors, listed under the category 'all other relevant facts and circumstances' . . . essentially require a reasonable excuse for the delay and a showing of lack of prejudice" (citation omitted) (Narcisse v. Incorporated Village of Cent. Islip, __AD2d__, 2007 NY Slip Op 00652, *1 [2nd Dept, January 30, 2007]). Thus, although no single factor is necessarily determinative, the acquisition of actual knowledge must be accorded great weight (see James v. City of New York, 242 AD 2d 630 [2nd Dept 1997]) and is the one factor that must be given special consideration. Although a proper set of these other factors may override the absence of actual knowledge, the totality of the facts and circumstances in this case does not weigh in favor of allowing a late notice of claim.

Plaintiff's mother avers in her affidavit in support of the

motion that she was preoccupied with caring for plaintiff and trying to make his life “as normal as possible.” However, she did nothing to assert a claim for 9 years. She contends that she did not know that she had to file a notice of claim. However, such ignorance does not constitute a reasonable excuse (see James v. City of New York, supra).

The lengthy delay substantially prejudices the City's ability to investigate the claim and other circumstances surrounding the accident (see, Matter of Gofman v. City of New York, 268 A.D.2d 588 [2d Dept. 2000]).

Under the totality of the circumstances, it would be an improvident exercise of this Court’s discretion to allow the filing of a notice of claim at this late juncture.

Accordingly, the motion is denied.

Dated: February 26, 2007

KEVIN J. KERRIGAN, J.S.C.